STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2010
v	No. 288790 Jackson Circuit Court
JIMMY RAE COLE, Defendant-Appellant.	LC No. 08-004256-FC

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon (felonious assault), MCL 750.82, unlawful driving away an automobile, MCL 750.413, and aggravated domestic violence, MCL 750.81a(2). He was sentenced as an habitual offender third offense, MCL 769.11, to 9 to 20 years' imprisonment for his assault with intent to commit great bodily harm conviction, four to eight years' imprisonment for his assault with a dangerous weapon conviction, four to ten years' imprisonment for his unlawful driving away conviction, and 204 days in jail for his aggravated domestic violence conviction, with credit for 204 days served. All of the sentences were to run concurrently. He appeals as of right. We affirm.

On the evening of April 14, 2008, defendant met the victim in the parking lot of her place of employment at the end of her workday. Defendant and the victim had previously ended their six-year relationship in January of that year. Defendant requested a ride to his home. The victim acquiesced. When she pulled into defendant's driveway, defendant indicated they should rekindle their relationship. The victim disagreed, at which point defendant punched her in the face repeatedly for three to four minutes. Defendant then pulled her out of the vehicle and dragged her by the arm into his home, where he said he had a knife. A passerby in a white pickup truck saw the altercation and called the police. Once in the house, defendant obtained a knife and commanded the victim to lie on his bed. Defendant lay down next to her, with the knife in his hand. After several minutes, defendant told the victim they needed to leave before the police arrived, and they then left the house. As they walked toward the victim's vehicle, the victim ran from defendant and towards the white pickup truck, which was parked along West Michigan Avenue. Defendant chased the victim, caught up with her in the middle of the street, knocked her to the ground and fell down himself. The passerby testified that he saw defendant raise his arm in the air toward the victim's back with a black object in his hand. Defendant subsequently stood up and took the car keys from the victim; he then entered her vehicle and

drove from the scene. The victim was treated for wounds following the incident, including surgery to remove a knife blade that was found lodged in her shoulder.

Defendant first argues there was insufficient evidence to prove that he specifically intended to commit the assault with intent to cause great bodily harm. Essentially, he argues that he did not intend to stab the victim with the knife when he fell on her in the street. In reviewing this issue, we review all evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

Assault with intent to cause great bodily harm less than murder consists of two elements: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997); MCL 750.84. The second element requires proof of specific intent, as opposed to general intent. *Id.* at 239; *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). "[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983) (citation omitted). "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *Brown*, 267 Mich App at 147, citing *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). "An intent to harm the victim can be inferred from defendant's conduct." *Parcha*, 227 Mich App at 239.

The facts indicate that defendant repeatedly punched the victim in the face before dragging her into his home. He held her captive with a knife for several minutes. When the victim ran to another vehicle, defendant chased after her with his knife. A witness testified that when defendant caught up with the victim, his arm was raised and it came down in a stabbing motion; the victim was pushed or went down to the pavement and defendant went down on top of her. The knife broke off at the handle and remained inside the victim's shoulder. The injury was life-threatening because it nearly severed the subclavian artery, which would have killed the victim within minutes. Viewing this evidence in the light most favorable to the prosecution, we find that a reasonable trier of fact could have concluded beyond a reasonable doubt that defendant intended to stab the victim in the back with a knife. Furthermore, a rational trier of fact could have also inferred that because defendant stabbed her with a knife, a potentially deadly weapon, he intended to cause serious bodily injury and harm. See, e.g., *Parcha*, 227 Mich App at 239; *People v Cunningham*, 21 Mich App 381, 383-384; 175 NW2d 781 (1970).

Next, defendant contends that the trial court erroneously scored offense variables (OVs) 4, MCL 777.34, and 7, MCL 777.37. We review "a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion[.]" *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We will uphold a scoring decision if there was any record evidence to support it. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

MCL 777.34 provides:

> (1) Offense variable 4 is psychological injury to a victim. Score offensive variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim. . . 10 points.
>
> * * *
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Because defendant failed to preserve his argument regarding OV 4, we review for plain error affecting his substantial rights. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). Plain error exists if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted). The facts support the scoring of ten points for OV 4. The victim testified that she was scared throughout the assault and while defendant held her captive in the home. This is sufficient evidence to support a finding of psychological injury. *People v Davenport*, 286 Mich App 191, 200; __ NW2d __ (2009).

> MCL 777.37 provides:
>
> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense… 50 points

Defendant inflicted a serious and nearly fatal wound on the victim after severely beating her with his fists and holding her hostage with a knife. She underwent emergency surgery to remove a knife blade that went through her shoulder blade and clavicle. She also suffered bruises to her face, head, arms and wrists. Thus, we conclude that the record supports the trial court's scoring of 50 points for OV 7, and its decision fell within the principled range of outcomes. *People v Blunt*, 282 Mich App 81, 88-89; 761 NW2d 427 (2009); *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005).

Next, we address several issues raised by defendant in propria persona in his Standard 4 brief. First, we note that defendant has failed to sufficiently brief the merits of several of his numerous claims including ineffective assistance of counsel, judicial bias, sentencing based on inaccurate information, omissions by the preparer of the presentence investigation report (PSIR) who allegedly failed to investigate important facts relevant to sentencing, and cumulative error. In each of these instances, defendant frames the issue in his statement of the questions presented and attaches select portions of the trial transcript. He also attaches a few Michigan case summaries. But, defendant has not articulated any analysis or discussion as to how these

portions of the trial transcript or cases support his position, or why he is entitled to relief for any of these issues. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.") See also *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

In his Standard 4 brief, defendant also challenges the trial court's scoring of prior record variable (PRV) 1, MCL 777.51, PRV 5, MCL 777.55, and OV 10, MCL 777.40. Because he did not object to these issues at sentencing, we review for plain error affecting his substantial rights.[1] *People v Endres*, 269 Mich App 414, 422; 711 NW2d 398 (2006); *Odom*, 276 Mich App at 411. A plain error in the calculation of the sentencing guidelines range that increases the length of the defendant's sentence constitutes plain error affecting substantial rights. *Brown*, 265 Mich App at 66-67. To the extent that defendant's challenge raises a question of law and interpretation of a sentencing statute, this Court's review is de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

MCL 777.51(1)(b) provides that a trial court may assess 50 points for PRV 1 if "[t]he offender has 2 prior high severity felony convictions." MCL 777.50 defines "conviction" for purposes of PRV 1. We find that because MCL 777.50 includes prior youthful offender convictions and expunged convictions under the definition, the Legislature intended the term "conviction" to be applied broadly to all convictions in a defendant's criminal record. MCL 777.50 also provides that any such conviction cannot be counted if there has been "a period of 10 or more years between the discharge date from a conviction" and the "commission of the next offense resulting in a conviction." Contrary to defendant's position, MCL 777.55 expressly applies to PRV 5 only, and, thus it does not limit the kinds of convictions subject to the ten-year rule under MCL 777.50. Thus, we reject defendant's contention that the trial court erred when it used his 1999 misdemeanor conviction when it scored PRV 1. It was not an error for the trial court to conclude that less than ten years had passed from the 1999 conviction and defendant's release from prison in 1992 for his most recent high severity felony conviction. MCL 777.50. As such, we also find that it was not error for the trial court to consider defendant's 1982 high severity felony conviction under PRV 1. As a corollary to his argument regarding PRV 1, defendant contends that the PSIR did not accurately portray his prior criminal convictions, specifically he had no 1982 high severity conviction. However, because defendant did not support this argument with any legal analysis or facts, we consider it abandoned. *Matuszak*, 263 Mich App at 59; *Harris*, 261 Mich App at 50. Nevertheless, we note that the prosecutor appears to agree that there was no 1982 high severity felony conviction. But, the prosecution indicates another high severity conviction exists that could be scored under PRV 1. Thus, it appears PRV 1 could be scored at 50 points regardless of the alleged mistake. There exists no plain error requiring reversal.

[1] After sentencing, defense counsel moved for resentencing, which challenged the scoring of PRVs 1 and 5, and OVs 4, 7, and 10. Defense counsel however withdrew the motion after filing his brief on appeal. We therefore consider the issue unpreserved. *Carines*, 460 Mich at 761-762; *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994).

MCL 777.55 provides that a trial court may score five points for PRV 5 if an "offender has 2 prior misdemeanor convictions[.]" Defendant states in his brief that the trial court should not have used his 2002 misdemeanor of operating while intoxicated (OWI) when it scored this PRV because he did not knowingly waive his right to counsel before pleading guilty to that conviction. The relevant portions of the transcript from that plea, along with an "Advice of Rights" form he signed contemporaneously, were attached to pleadings and are in the lower court file. Our review of these documents indicates that defendant indeed knowingly waived his right to court appointed counsel at public expense. Thus, we conclude that the trial court did not commit plain error when it scored PRV 5.

Finally, MCL 777.40 governs OV 10, and provides: "Score offense variable 10 by determining which of the following apply by assigning the number of points attributable to the one that has the highest number of points. . . [t]he offender exploited a victim by his or her difference in size or strength, or both[.]" "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(c). Here, the facts indicate that defendant was approximately six feet, two inches tall; the victim was five feet, four inches tall. Defendant repeatedly punched the victim in the face for three to five minutes. He dragged her into his home and held her captive with a knife. He ultimately stabbed her in the back of the shoulder when she attempted to run away. The trial court did not commit plain error when it scored OV 10 at five points.

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis